

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
November 22, 2005 Session

STATE OF TENNESSEE v. ART MAYSE

Appeal from the Criminal Court for Fentress County
No. 7753 E. Shayne Sexton, Judge

No. M2004-03077-CCA-R3-CD - Filed April 27, 2006

The Appellant, Art Mayse, was convicted by a Fentress County jury of eight counts of rape of a child and four counts of aggravated sexual battery. Following a sentencing hearing, Mayse was sentenced to an effective thirty-two year sentence in the Department of Correction. On appeal, he has raised ten issues for our review: (1) whether the trial court erred in allowing the victim to testify in her Marine uniform; (2) whether the trial court erred in failing to strike four jurors for cause; (3) whether the trial court erred by engaging in improper *ex parte* communications with the jury; (4) whether the State's Bill of Particulars failed to sufficiently inform Mayse of the charges against him; (5) whether the trial court erred in failing to grant Mayse's motion for a change of venue; (6) whether the trial court erred by denying Mayse's motion for continuance; (7) whether the sentences imposed by the trial court violate *Blakely v. Washington*; (8) whether the trial court erred in denying Mayse's motion to recuse; (9) whether the evidence is sufficient to support the convictions; and (10) whether Mayse was denied a fair trial based upon the cumulative effect of errors committed. After review of the record, we find no reversible error and affirm the judgments of conviction and resulting sentences.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed

DAVID G. HAYES, J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

Charles D. Buckholts, Oak Ridge, Tennessee, for the Appellant, Art Mayse.

Paul G. Summers, Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; Wm. Paul Phillips, District Attorney General; and John W. Galloway, Jr., Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

In July 1992, the Appellant became pastor at Round Mountain Baptist Church in Fentress County where the victim and her family attended services. At the time, the victim was seven years

old. The Appellant and his family lived two houses down from the victim's family. The two families became very close, often spending time together in and outside of church. The victim and her brother regularly visited the Appellant's home and affectionately referred to him as Papaw Art. Approximately two years later, the Appellant left Round Mountain Baptist Church and began Lighthouse New Beginning Church. The victim and her family followed. The close relationship between the families continued, with the victim, her brother, and her mother visiting the Appellant's family almost daily. The victim, sometimes alone and sometimes with her brother, helped the Appellant cut firewood and helped him clean the laundromat where he worked.

In the summer of 1993, between the victim's third and fourth grade years of school, the Appellant began to inappropriately touch the victim. On multiple occasions, while she was sleeping or lying down, the Appellant would either touch her intimate parts or put his fingers inside her vagina. She stated that, except for one occasion, she always pretended to remain asleep because she was afraid to open her eyes. The victim described incidents which occurred at the Appellant's home in the living room, in the Appellant's wife's bedroom, in the back bedroom in the garage, and in the Appellant's bedroom. She also described incidents in the Appellant's office at Round Mountain Baptist Church, in the vehicle on the way home from singing practice, in the vehicle after cutting firewood, at the laundromat, in a van on the way home from cleaning the laundromat, and in her own living room. At trial, the victim related the following:¹

[Count 5; between July 1992–February 1995]: Once in Patsy's [the Appellant's wife's] bedroom. She - - she had left to go to work. She worked at the hospital late at night. I was on the couch and she left to go to work. He put a piece of wood in between the sliding glass door and the wall so the door couldn't open. I guess that was his way of locking it. And he carried me into Patsy's room because I had asked her if I could sleep with her that night, and she said yes, as soon as she got home from work, she would come and get in the bed with me.

And I remember laying there. I was asleep, and I felt someone come in there and he pulled my pants down, he put his fingers inside of me and touched me, and I heard Patsy beat on the door. I assumed it was Patsy. Someone was beating on the door. And he hurried up and put my clothes back on me and ran in there, and I heard Patsy come in and ask why the door was locked and why it took so long for him to come in there to open the door.

[Count 6; between July 1992–February 1995]: I remember a time in the back bedroom. He had a bedroom in the garage. It was like their storage room. There was a washer and dryer back there. [The Appellant's son] Chuck and Patsy had left, and he carried me back there and laid me sideways on the bed, and I went to sleep - - I was asleep. And he came in there, he pulled down my pants and put his fingers

¹The incidents are presented in the order in which they were testified to at trial by the victim as opposed to the chronological order in which they actually occurred.

inside of me and kissed on my chest, and he put my clothes back on me and went back in there and I just laid there.

[Count 7; between July 1992–February 1995]: Chuck was there. It was me, Chuck, and [the Appellant]. And I said that I wanted to go take a nap, and [the Appellant] told me to go in the back bedroom. And I went back there, got in the bed and went to sleep, and I heard someone pull off in a vehicle and I just laid there and went back to sleep. A few minutes later I felt someone come in there and lay down behind me and put their arms around me. And then I felt someone put their hand down my pants, put their fingers inside of me, rub on me, kiss on me. And then it went on for a little while and I heard a vehicle pull back up and felt someone jump off the bed and run to the garage door and look outside in the driveway, and it was [the Appellant] cause I opened my eyes and just looked and then I closed them real fast, and he ran - - he ran back in there and it was Chuck who had come back.

[Count 14; between July 1992–February 1995]: [O]ne time in between church services at the Lighthouse. For morning church services, I always wear a dress and dressed up. And then for the late church services, I wore just like pants or a T-shirt or something; we didn't dress up. And I went home with him in between the services, and I was taking a nap. He was taking a nap with me.

And I remember somebody taking off my dress and pulling me on top of them, and then he put his hands down my pants and put his fingers inside of me and rubbed and kissed on me. And then I remember moving around and waking up, and I said, "What are you doing?" And he said, "I'm changing your clothes for church," and then he finished helping me get dressed.

[Count 2; between July 1992–October 1994]: [When the Appellant was pastor at Round Mountain Baptist Church,] [h]e picked me up from school one day cause I was sick and we couldn't get a hold of my parents or my grandma. And he took me back to Round Mountain because he had to study for the service. And we went up into his office, and I was sick so I laid down on the couch.

And I remember him coming over there and rolling me over on my back and sitting down in the floor in front of me. And he pulled down my pants, he put his fingers inside of me, he rubbed and touched on me, and I heard my grandma coming up the stairs and he heard her too, and he hurried up and put my clothes back on me - - just pulled up my pants and ran back over to his desk.

And I remember opening my eyes, and he had on a red sweater with a white undershirt. And then my grandma came in there and my grandma took me home.

[Count 3; between July 1992–February 1995]: [While driving home from singing practice at Round Mountain Baptist Church, the Appellant told her] to lay down and stretch out and just rest, and he would put his hands down [her] pants and touch [her] on the way back home. [During these occasions, the Appellant inserted his fingers in her vagina].

[Count 8; between July 1992–February 1995]: We watched - - we were watching movies and I was laying on the couch, and [the Appellant] was there, my head was in his lap. He told Patsy to go make some popcorn and to get me some covers, so she went and got me some covers and covered me up. And then he would tell her to go back in the kitchen, and she would go back in the kitchen and make some popcorn or do whatever. And while I was laying there asleep, he would put his hands down my pants and just touch me.

[Count 9; between July 1992–February 1995]: One time I was laying on the couch. [The Appellant] was in the chair or something, and my mom was standing in the floor in front of me on the couch and she had to leave to go pick up my little brother from practice or something. And I - - we had been watching TV and I fell asleep, and he came over there and sat down in front of me on the couch and pulled down my pants and put his fingers inside of me.

[Count 11; between July 1992–February 1995]: I remember one time that it was real rainy and cold outside, and we had been in there cleaning. And I went into the - - he had already cleaned up and put all the trash in the van so we could take it off, and I was sitting in the van trying to get warm. And we went and took the trash off, and he put a bucket or a box or something in between the seats because they weren't connecting and told me to lay down because I had school the next day. And he would put his hands down my pants on the way home and touch me.

[Count 12; between July 1992–February 1995]: One time my little brother was with me. And in the van, it had three seats and in the back - - my brother was laying in the second seat. And there was like light bulbs and stuff in the front seat that [the Appellant] was bringing home with him. And he would do the same thing. He would put the little bucket in between the seats and tell me to lay down because I had school the next day. And he would put his hands down my pants on the way home and touch me.

[Count 13; between July 1992–February 1995]: I remember one time that I went with him and it was really, really early of the morning, and we went in there and cleaned. And [the Appellant] went through all of this stuff that had been left there to see if he could find anything, I guess. And we went back - - he done the same thing, put the bucket in between the seats and told me to lay down. And the next day, I didn't go to school because it was really, really later cause I was really tired.

[Count 10; between July 1992–February 1995]: Me and my brother went with him [to the church] because the heat had broken. We were supposed to be having services there, and all that was in the building at the time for heat was a wood stove in the basement in this little room in the basement.

And since [the Appellant] was gonna go work on the thermostat, I guess - - whatever - - to make it warm in there, he told me and my brother to go in there where it was warm because that was the only place in the church that it was warm and go to sleep, and my brother laid on one side of the room and I laid on the other and we went to sleep. And sometime during that night, [the Appellant] came in there with me, and he rolled me over and pulled my pants down, put his fingers inside of me and touched me and rubbed on me. And my little brother just laid there. See, my little brother didn't know anything was going on.

In 1995, the victim's family stopped attending the Lighthouse New Beginnings Church and returned to Round Mountain after a dispute over church business with the Appellant. The family's relationship, while still friendly, was no longer as close. No other incidents of abuse occurred.

In 1999, after seeing a video on sexual abuse at a youth group function, the victim told her mother about the Appellant's abuse of her, and an investigation began. The victim was examined by a nurse practitioner, whose findings stated the victim's hymen was not intact. The reported injuries were consistent with digital penetration; however, no determination could be made with regard to when the sexual assaults had occurred.

On May 14, 1999, a Fentress County grand jury returned a twenty-count indictment against the Appellant charging him with fifteen counts of rape of a child and five counts of aggravated sexual battery. Following a jury trial, the Appellant was convicted of eleven counts of rape of a child and seven counts of aggravated sexual battery. However, on direct appeal, a panel of this court reversed the convictions and remanded the case for a new trial.²

In January 2004, the Appellant was retried on eleven counts of child rape and five counts of aggravated sexual assault. At trial, the Appellant testified and categorically denied all allegations of sexual abuse. His wife and a son were called as defense witnesses. On January 22, 2004, the Appellant was convicted of eight counts of rape of a child and four counts of aggravated sexual battery. The Appellant was acquitted of three counts of rape of a child and one count of aggravated sexual battery. Following a sentencing hearing, the Appellant was sentenced to twenty-two years for each rape conviction and to ten years for each aggravated sexual battery conviction. The child rape convictions were ordered to run concurrently with each other, as were the aggravated sexual

²On direct appeal of the first trial, a panel of this court reversed two aggravated sexual battery convictions for insufficient evidence. The remaining convictions were reversed and remanded for a new trial due to the trial court's failure to require the State to elect the offenses upon which it sought convictions. *State v. Art Mayse*, No. M2001-03172-CCA-R3-CD (Tenn. Crim. App. at Nashville, Jan. 22, 2003).

battery convictions; however, the rape convictions were ordered to run consecutively to the aggravated sexual battery convictions for a total effective sentence of thirty-two years. The trial court subsequently denied the Appellant's motion for new trial, with this appeal following.

Analysis

I. Military Uniform

First, the Appellant contends that it was error for the trial court to deny his motion requesting that the victim, a lance corporal serving on active duty in the United States Marine Corps, not be allowed to testify in her military uniform. The Appellant, prior to trial, moved the trial court to require the victim to testify in civilian attire, asserting that the State's sole motive for presenting the witness in uniform was to bolster her credibility before the jury. This motion was denied. On appeal, the Appellant asserts that "[i]t is not unreasonable that during a time when our nation is at war, that a jury would accord a witness in military uniform greater trust and credibility than a person on trial."

The attire of the parties should be of little or no interest to the court, absent the reasonable potential for: (1) risk to safety and security; (2) improper influence on the trier of fact; or (3) distraction from the court proceedings. *State v. Conway Fuqua*, No. 1178 (Tenn. Crim. App. at Knoxville, Aug. 28, 1991).

We find no case in Tennessee where a challenge has been made to a victim or a prosecuting witness appearing in a military uniform. However, the issue has arisen in other states. *State v. Aupperlee*, 168 A.D.2d 561 (Ny. 1990) (finding that permitting the victim to testify in his Marine Corps dress uniform did not deprive the defendant of a fair trial); *People v. Lloyd*, 529 N.Y.S.2d 562 (1988) (holding it not improper to allow a victim to testify in his Navy uniform as a jury would not automatically accord such a victim a greater measure of respect and trust merely because of the uniform); *Galmore v. State*, 467 N.E.2d 1173 (IN. 1984) (finding no error in allowing victim to testify in full military uniform as the defendant presented only his own conclusion as to the effect of the victim's appearance at trial).

Likewise, we find no error in allowing the victim in this case to testify dressed in her military uniform. While it may be true that the jury looked favorably upon a witness who was serving her county, we cannot automatically assume that the jury afforded her testimony more weight or credibility based solely on her appearance in military uniform. We find this little different from a police officer testifying in a police uniform. As argued by the State, whether a witness or a victim is a common laborer, an engineer, or a doctor, is a fact which may be considered by the jury but is clearly not determinative of the credibility of that person. Contrary to the Appellant's argument, we cannot equate this to a situation where the defendant is forced to appear in prison attire. *See Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691 (1976); *Carroll v. State*, 532 S.W.2d 934 (Tenn. Crim. App. 1975). This issue is without merit.

II. Failure to Strike Jurors for Cause

Next, the Appellant contends that the trial court erred by failing to strike four jurors for cause, three of which had close relationships with the victim or her family and one who had served as a former deputy sheriff. First, the State responds that no prejudice has resulted because the challenged jurors were not seated on the jury. Further, the State argues that because the Appellant failed to exercise all his peremptory challenges, he cannot now complain of the issue.

The purpose of voir dire is to ensure that jurors seated at trial are competent, unbiased, and impartial. *State v. Mann*, 959 S.W.2d 503, 533 (Tenn. 1997). The trial court is granted broad discretion to decide the manner in which voir dire will be conducted, and its decisions in this regard will not be disturbed on appeal absent a showing of abuse of discretion. *State v. Stephenson*, 878 S.W.2d 530, 540 (Tenn. 1994). Moreover, unless there has been clear abuse, the trial court's discretion in determining the qualifications of jurors is not subject to review. *Lindsey v. State*, 225 S.W.2d 533, 538 (Tenn. 1949).

In this case, the Appellant moved to strike four jurors for cause: (1) Juror Lowe who stated he worked with the victim's mother in the past; (2) Juror Cooper who stated she was a close friend of Lois Winningham who was a close friend of the victim's family and had heard "talk" about the case; (3) Juror Hammonds who stated he worked with the victim's father and that his mother was a close friend of the victim's mother; and (4) Juror Todd who previously served as a deputy sheriff in Fentress County, though not during the period when this case was being investigated. Jurors Lowe, Cooper, and Hammonds, although initially expressing some concerns, stated that they would follow their oath. Juror Todd specifically stated that he had no opinion with regard to the case and could be fair to both sides. From the record, it appears that the Appellant exercised peremptory challenges, and these four prospective jurors were never impaneled as jurors.

In denying the Appellant's challenges for cause of the three jurors, the trial court concluded:

The three jurors that expressed - - if I'm not - - let me try to use the proper terminology here. I think they said they might have leanings but they would follow the law. And defense counsel made a timely motion for challenge on cause. The Court denied it at that time and also said, though, that I will consider at the end of the line if new challenges are needed, they will be given.

And I had in the back of my mind decided that if counsel had needed more challenges, you would have gotten them. There simply was no reason at that point for me to excuse those three jurors if counsel was gonna do it anyway. If counsel had more challenges left, then there would be no foul there.

I felt like that they met the criteria for qualification. They obviously had some concerns, as many of the jurors expressed some concerns about serving in this

kind of case anyway. But defense counsel did the proper thing, which was issue a peremptory challenge for each of those.

Review of the record does not reveal a dialogue with regard to the challenge of Juror Todd.

We note, as the Appellant acknowledges, that this court has previously held that “it is only where a defendant exhausts all of his peremptory challenges and is thereafter forced to accept an incompetent juror can a complaint about the jury selection process have merit.” *State v. Harlen Roy L. Zirker*, No. M2003-02546-CCA-R3-CD (Tenn. Crim. App. at Nashville, May 12, 2005) (citations omitted).

The trial court had wide discretion in ruling upon the qualifications of a juror. *State v. Kilburn*, 782 S.W.2d 199, 203 (Tenn. Crim. App. 1989). When the trial court erroneously refuses to excuse a juror for cause, the error is harmless unless the jury that heard the case was not fair and impartial. *State v. Thompson*, 768 S.W.2d 239, 246 (Tenn. 1989). It is well-settled that a defendant who disagrees with a trial court’s ruling on juror challenges “for cause” must, in order to preserve the claim that the ruling deprived him of a fair trial, first utilize such peremptory challenges as he has available to remove the jurors. *State v. Howell*, 868 S.W.2d 238, 248 (Tenn. 1993). The trial court’s failure to properly exclude a juror for cause is grounds for reversal only if the defendant has exhausted all of his peremptory challenges and an incompetent juror is then forced upon him. *Ross [v. Oklahoma]*, 487 U.S. [81], 89, 101 L. Ed. 2d. 80, 108 S. Ct. [2273], 2279 [(1988)]; *State v. Jones*, 789 S.W.2d 545, 549 (Tenn. 1990).

Initially, we note that no error is observed in the trial court’s refusal to strike the challenged jurors for cause, as each juror expressed that he/she could follow the law and be fair to both sides. Regardless, even if error existed, the record clearly establishes that the Appellant did not exhaust his peremptory challenges during jury selection. In fact, these jurors were excused from the panel by the Appellant through his peremptory challenges; thus, the Appellant was not forced to accept an incompetent juror.

The Appellant urges that we find *Howell* and *Ross* not controlling in this case because the trial court did dismiss a juror for cause who exhibited bias against the prosecution prior to the State’s exhausting its peremptory challenges. However, the law is clear that before a challenge can be made on these grounds, a party must exhaust his peremptory challenges. The State further argues that the Appellant has not asserted that the jury which actually heard the case was not fair and impartial. The Appellant counters that he is asserting that this failure to remove these jurors for cause tainted the whole jury panel. We cannot agree. Nothing in the record indicates that the jury was in any way prejudiced by these actions. This issue is without merit.

III. *Ex parte* Communication with the Jury

Next, the Appellant asserts that the trial court erred by engaging in an *ex parte* communication with the jury during deliberations, which he contends resulted in prejudice to his right to a fair trial. Specifically, the Appellant asserts that:

the jury asked the Court a question off the record, which was related to the election of charges and jury instructions. The judge should have called a jury out and discussed the issue in front [of] both counsel for the State and Defendant. The jury question should have been answered in open court on the record with all parties present. . . . The jury verdict is compromised based upon this error

The Appellant's assertions are without foundation. Review of the record indicates that the jury question was discussed with both counsel and answered in open court. The *ex parte* communication did not involve the answering of a jury question, but rather assistance in the formulation of the question.

Trial courts should discontinue the practice of communicating with deliberating juries. *State v. Mays*, 677 S.W.2d 476, 479 (Tenn. Crim. App. 1984). Our supreme court has held that these types of communications are always error and should not occur. *Spencer v. A-1 Crane Service, Inc.*, 880 S.W.2d 938, 941 (Tenn. 1994). To prevent even the appearance of judicial partiality or unfairness, any proceeding involving the jury after it has retired for deliberations should be conducted in open court and in the defendant's presence. *State v. Tune*, 872 S.W.2d 922, 929 (Tenn. Crim. App. 1993); *Smith v. State*, 566 S.W.2d 553, 559-60 (Tenn. Crim. App. 1978). The proper method of fielding jury questions during deliberations is to recall the jury, counsel for both parties, the defendant, and the court reporter and to resolve the matter on the record. *Mays*, 677 S.W.2d at 479. The failure to follow the proper procedure, however, is subject to harmless error analysis. *Tune*, 872 S.W.2d at 929; *Mays*, 677 S.W.2d at 479. If the defendant has not been prejudiced by an inappropriate response, reversal is not required. *Tune*, 872 S.W.2d at 929.

The record reflects that during jury deliberations, the following jury question arose: "Does each individual charge have to be unanimous not guilty to be a not guilty verdict?" The trial court discussed the question with counsel for both parties and fashioned an appropriate response, taking into account arguments from both sides. The jury returned to the court room, and the trial court responded to the question by referring the jury back to sections previously instructed upon in the original charge. No new information was given to the jury in open court. The jury returned to deliberate, and the trial court stated, on the record, the events which had preceded submission of the jury's question.

THE COURT: Yes. Just for the record, let me just go through that - - what happened. It was indicated to the Court by the Jury Attendant that the Jury had a question but didn't know how to formulate it. The Court consulted with both sides and upon consent of the State and the defense, the Court - - the Judge - - I went into

the Jury Room and assisted very lightly in their asking the question - - how to form the question. And the only - - the sole reason I did that is they may never have been able to come up with the proper verbiage to put up with it. So, the question that was raised on the record was actually more in depth than they raised with me. So I wanted [the Appellant's trial counsel] to approve of that. Mr. Mayse, is there anything that you wanted to say about that for the record? If you want to talk to [trial counsel] - - maybe he needs to explain it to you a little better, but do you want to - -

[TRIAL COUNSEL:] We actually - - I discussed it with him and explained what I thought the Court was doing and you know - -

THE COURT: And just for the record, the Court did not - - did not consult with the Jury concerning their verdicts. We did not discuss anything about where they were in the process. So, you know, all I did was go back and try to given them some guidance about forming the question that they had for everyone, so that's where we're at. . . .

Thus, from a reading of what transpired, it appears that the trial court consulted with the jury on the formation of a question but that the court did so with the approval of the Appellant and the State. As such, the Appellant's assertion that the trial court should have consulted both parties prior to taking action appears to be groundless. Notwithstanding our conclusion that reversible error did not occur, we again emphasize that trial courts should refrain from directly communicating with a deliberating jury unless in open court, on the record, and in the presence of counsel and the defendant.

IV. Bill of Particulars/Election

Next, the Appellant argues:

The court erred in not dismissing the charges against the [Appellant] because the Bill of Particulars, Election of Offenses and Jury failed to sufficiently inform him of the charges against him. The failure of the prosecution to specify through direct testimony the span of time in which the acts were supposed to have occurred prejudiced the [Appellant].

The issue, as presented, is imprecise. First, our review reveals no motion by the Appellant seeking dismissal of the charges against him due to the insufficiency of the bill of particulars. Furthermore, the Appellant's argument that the charges should have been dismissed because the "Election of Offenses and Jury failed to sufficiently inform him of the charges against him" is not discernable. Finally, the Appellant's assertion that the State's proof failed "to specify through direct testimony the span of time the acts were supposed to have occurred," would appear to relate more appropriately to an insufficiency of the evidence argument than to the presented prejudice argument.

Nonetheless, we elect review of the Appellant's challenge to the bill of particulars and his argument that the State failed to provide "facts alleging what was to have occurred," but rather "only states the legal conclusion that [the Appellant] committed Rape of a Child and Aggravated Sexual Battery." Rule 7 of the Tennessee Rules of Criminal Procedure provides that upon a defendant's motion, "the court may direct the filing of a bill of particulars so as to adequately identify the offense charged." "The purpose of the bill of particulars is to provide information about the details of the charge when necessary for a defendant to prepare his or her defense, to avoid prejudicial surprise at trial, and to enable the defendant to preserve a plea of double jeopardy." *State v. Speck*, 944 S.W.2d 598, 600 (Tenn. 1997). "Information that may be required in the bill of particulars includes, but is not limited to, details as to the nature, date, or location of the offense." *Id.*

The Tennessee Supreme Court has directly addressed the issue of the utilization of a bill of particulars in child sexual abuse cases in which the victim, and therefore the prosecution, is unable to determine the specific dates on which the alleged abuse occurred. *State v. Byrd*, 820 S.W.2d 739, 741-42 (Tenn. 1991). The court noted that when a child is too young to remember exact dates, "the child may be able to define the time of the offense by reference to such memorable occasions in a child's life as birthdays, seasonal celebrations and holidays, the beginning or end of the school year, or visitation by relatives." *Id.* at 742. However, even if the prosecution is unable to offer exact dates or even the approximate time of the alleged offense by means of descriptive reference, "a conviction may nevertheless be affirmed if in the course of the trial it does not appear that the defendant's defense has been hampered by the lack of specificity." *Id.*

We find no error in the bill of particulars provided in this case. The record reflects that the State filed an amended bill of particulars on January 15, 2004, which detailed the sixteen separate counts. Though no specific dates are noted, each offense is alleged within a specified time frame. Likewise, during the State's case-in-chief, no specific dates for the respective offenses were given. However, the victim testified regarding the general time-frame of the occurrences. Moreover, each incident is alleged to have occurred at a specific place. We find this sufficient to apprise the Appellant of the charges against him. Moreover, we would note that this was the second trial conducted involving these same incidents of sexual misconduct. The Appellant has failed to show that he suffered prejudice because of a lack of specific dates of the events and failed to show how his defense would have been different had the specific dates been available.

Moreover, with regard to the election of offenses, the record demonstrates that the trial court properly instructed the jury regarding the requirement of jury unanimity. The instructions given were clear that "the jury must unanimously decide if sufficient proof was presented to identify a single act by the defendant that would constitute the crime charged." After review, we find no error.

V. Change of Venue

The Appellant asserts that the trial court erred by failing to grant his request for a change of venue. A criminal offense shall be prosecuted in the county where the offense was committed, unless otherwise provided by statute or court rule. *State v. Davidson*, 121 S.W.3d 600, 611 (Tenn.

2003); *see also* Tenn. R. Crim. P. 18(a). Venue may be changed on motion of the defendant “if it appears to the court that, due to undue excitement against the defendant in the county where the offense was committed or any other cause, a fair trial probably could not be had.” Tenn. R. Crim. P. 21(a); *see also* *State v. Dellinger*, 79 S.W.3d 458, 481 (Tenn. 2002). A motion for change of venue shall be accompanied by affidavits alleging the facts that constitute “undue excitement” or other grounds. Tenn. R. Crim. P. 21(b).

The fact that a juror has been exposed to pre-trial publicity does not of itself warrant a change in venue. *State v. Mann*, 959 S.W.2d 503, 532 (Tenn. 1997). A court must instead consider a number of factors, including the nature and extent of pre-trial publicity, the degree of publicity in the area from which the venire will be drawn, the existence of hostility or demonstrations against the defendant, and the length of time between the pre-trial publicity and the trial. *Hoover*, 594 S.W.2d 743, 746 (Tenn. Crim. App. 1979). A court must also consider the effect that pre-trial publicity may have on jury selection. *Id.* Relevant factors in this regard include the size of the area from which the venire will be drawn, the potential jurors’ familiarity with the pre-trial publicity, the effect on potential jurors shown during jury selection, and the defendant’s use of peremptory challenges and for-cause challenges. *Id.*

The trial court has the discretion to determine whether to grant a change of venue, and its discretion will be reversed only for a clear abuse of discretion. *Dellinger*, 79 S.W.3d at 481. Furthermore, the defendant must demonstrate that the jurors who actually sat were biased or prejudiced against him before his convictions will be overturned on appeal. *State v. Melson*, 638 S.W.2d 342, 361 (Tenn. 1982). “The test is whether the jurors who actually sat and rendered verdicts were prejudiced by the pre-trial publicity.” *State v. Crenshaw*, 64 S.W.3d 374, 386 (Tenn. Crim. App. 2001) (citations omitted).

Initially, as the State correctly argues, the Appellant has waived review of this issue by his failure to renew his motion for change of venue. The record before us indicates that prior to his first trial in 1999, the Appellant filed a motion for change of venue, which was denied. The decision was affirmed on direct appeal. Nothing in the record indicates, however, that the Appellant renewed that motion prior to his re-trial. In fact, the Appellant concedes that he should have renewed the motion. Therefore, we conclude that the motion was abandoned, and the issue is waived. The Appellant’s failure to take action to nullify the harmful effect of the error, if any, or otherwise raise this issue below, or to demonstrate prejudice, precludes reversal on this ground. Tenn. R. App. P. 36 (a).

Nonetheless, even if reviewed on its merits, the Appellant has failed to state a claim for relief. The Appellant urges us to consider that:

... the Court became aware of the potential jurors’ familiarity and prejudices against [the Appellant] during voir dire. Fentress County is a sparsely populated rural county and child rape is a heinous charge. The fact that [the Appellant] was a preacher at a church in a small community made it even more difficult for him to get a fair jury trial in Fentress County.

Furthermore, this was the second time the [Appellant] was tried in Fentress County. Many of the prospective jurors had heard about the case and several had already formed opinions. The [Appellant] also had the same judge who had heard evidence in the previous trial.

The Appellant has failed to demonstrate that the jurors who were seated were actually biased or prejudiced against him as a result of pre-trial publicity. The record contains no evidence regarding the nature of any pre-trial publicity, its content, the degree of which the publicity permeated the area from which the venire was drawn, or the time lapse between the publicity and the trial. *See Hoover*, 594 S.W.2d at 746. The fact that the Appellant was a preacher in a small community and that a prior trial had occurred years before does not in and of itself guarantee a biased jury. The Appellant has simply failed to introduce any evidence supporting his claim. “In the absence of a complete record, we must presume that the trial court correctly denied the motion for change of venue.” *Crenshaw*, 64 S.W.3d at 387. Accordingly, this issue is without merit.

VI. Motion to Continue

The Appellant also argues that the trial court abused its discretion by denying his motion for continuance. The granting of a continuance rests within the sound discretion of the trial court. *State v. Odom*, 137 S.W.3d 572, 589 (Tenn. 2004). We will reverse the denial of a continuance only if the trial court abused its discretion and the defendant was prejudiced by the denial. *State v. Hines*, 919 S.W.2d 573, 579 (Tenn. 1995). In order to show prejudice, the defendant must demonstrate that a different result might reasonably have been reached if the trial court had granted the continuance or that the denial of the continuance denied the defendant a fair trial. *Id.* Moreover, a defendant who asserts that the denial of a continuance constitutes a denial of due process or the right to counsel must establish actual prejudice. *Odom*, 137 S.W.3d at 589.

As the State correctly points out, the record contains a motion filed on September 8, 2003, in which trial counsel stated he was appointed on May 12, 2003, to represent the Appellant. In light of the complicated nature of the case, trial counsel requested that the case be reset for January 2004. That motion was granted by the trial court, and the case was set for January 21, 2004. On January 12, 2004, trial counsel filed a second motion for continuance, citing a heavy caseload, personal illness, and problems with discovery. The record fails to reveal any specific action taken with regard to this motion, as there is no written record or transcript of the proceedings. We must assume it was denied, as the case proceeded to trial on January 21.

The Appellant has failed to establish that any prejudice resulted from the denial of this motion. He merely argues that the request for more time to adequately prepare should have been granted “especially considering the difficulty of the case and the seriousness of the charges against [the Appellant].” Finding no abuse of discretion, this issue is without merit.

VII. Sentencing

Next, the Appellant challenges the sentence lengths imposed by the trial court as well as the imposition of consecutive sentencing. Specifically, he argues that the trial court erred by failing “to state its reasoning for enhancement of Defendant’s sentence pursuant to Tenn. Code Ann. § 40-35-115 or consider the Defendant’s age and poor health as possible mitigating factors pursuant to Tenn. Code Ann. § 40-35-113(13).” He further argues that the court applied enhancement factor 16, that the Appellant abused a position of public or private trust, in violation of *Blakely v. Washington*. He also asserts that consecutive sentencing was not proper pursuant to *Blakely*, as no findings were made by a jury.

We note initially that the *Blakely* claim has been rendered moot by the Tennessee Supreme Court's recent decision in *State v. Gomez*, 163 S.W.3d 632 (Tenn. 2005). Our supreme court held that the 1989 Sentencing Reform Act “authorizes a discretionary, non-mandatory sentencing procedure . . . [which] sets out broad sentencing principles, enhancement and mitigating factors, and a presumptive sentence, all of which serve to guide trial judges in exercising their discretion to select an appropriate sentence within the range set by the Legislature. Under the Reform Act, the finding of an enhancement factor does not mandate an increased sentence.” *Id.* at 661. Accordingly, the court held that the Tennessee Sentencing Reform Act does not violate the Sixth Amendment guarantee of a jury trial and is, thus, not affected by the *Blakely* decision. *Id.* As such, the Appellant is not entitled to relief under *Blakely*.

With regard to the length of the Appellant’s respective sentences, our sentencing law provides that when an accused challenges the length, range, or manner of service of a sentence, this court has a duty to conduct a *de novo* review of the sentence with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (2003); *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). This presumption is “conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” *Ashby*, 823 S.W.2d at 169. When conducting a *de novo* review of a sentence, this court must consider: (a) the evidence, if any, received at trial and the sentencing hearing; (b) the pre-sentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the Appellant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. T.C.A. §§ 40-35-102, -103, -210 (2003); *Ashby*, 823 S.W.2d at 168. Furthermore, we emphasize that facts relevant to sentencing must be established by a preponderance of the evidence and not beyond a reasonable doubt. *State v. Winfield*, 23 S.W.3d 279, 283 (Tenn. 2000). The party challenging a sentence bears the burden of establishing that the sentence is erroneous. T.C.A. § 40-35-401(d), Sentencing Commission Comments.

If our review reflects that the trial court, following the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and made findings of fact that are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different

result. *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). However, where the trial court fails to comply with the statutory provisions of sentencing, appellate review is *de novo* without a presumption of correctness. Review of the record reveals that the trial court made explicit findings with regard to its sentencing decisions and considered the sentencing guidelines in determining the sentence; accordingly, we find that the presumption of correctness applies.

The Appellant was convicted of eight counts of rape of a child, Class A felonies, and four counts of aggravated sexual battery, Class B felonies. For standard offenders, the appropriate sentence range for a Class A felony is fifteen to twenty-five years, and the appropriate range for a Class B felony is eight to twelve years. T.C.A. § 40-35-112(a)(1), (2) (2003). The presumptive sentence for a Class A felony is the midpoint within the range absent enhancing or mitigating factors, and the presumptive sentence for a Class B felony is the minimum sentence in the range if there are no enhancement or mitigating factors present. T.C.A. § 40-35-210(c). The presumptive sentence is then increased for applicable enhancing factors and decreased for applicable mitigating factors. *Id.* at (d), (e).

Review of the record in this case reveals that the trial court explicitly found two applicable enhancing factors: (1) a previous history of criminal convictions and (2) an abuse of a position of public or private trust. *See* T.C.A. § 40-35-114(2), (16) (2003). We find no error in the application of these factors as the Appellant had a prior statutory rape conviction and clearly abused a position of private trust based upon his position as a minister and close friend to the victim in this case. Despite the Appellant's claim to the contrary, the record does reveal that the trial court took into consideration the Appellant's age and poor health under the catchall mitigator. *See* T.C.A. § 40-35-113(13) (2003). Based upon these findings, we find no error in the length of the sentences imposed.

The Appellant also contends that the trial court erred by ordering that the sentences in this case be served consecutively, specifically relying upon *Blakely*. As noted, the Tennessee Supreme Court has found *Blakely* inapplicable to our sentencing laws. *Gomez*, 163 S.W.3d at 632. Even prior to the decision in *Gomez*, however, our high court had specifically noted that *Blakely* did not impact our consecutive sentencing scheme. *State v. Robinson*, 146 S.W.3d 469, 499 n.14 (Tenn. 2004).

A trial court may impose consecutive sentences upon a determination that one or more of the criteria set forth in Tennessee Code Annotated section 40-35-115(b) exists. This section permits the trial court to impose consecutive sentences if the court finds, as relevant to this case, that:

The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims.

T.C.A. § 40-35-115(b)(5) (2003).

After a review of the record, we find, as did the trial court, that the imposition of consecutive sentences was proper pursuant to § 115(b)(5). Clearly, the Appellant has been convicted of more than two statutory offenses involving sexual abuse of a minor. A close and personal relationship existed between the Appellant and the victim. He served not only as her minister, but also as a close family friend, even being referred to as PaPaw Art by the victim. According to the testimony of the victim in this case, the abuse continued for a period of more than eighteen months. The nature and scope of the sexual acts ranged from inappropriate touching to digital penetration. The record also reflects that, as a result of the Appellant's sexual assaults, the victim has received extensive counseling while in the Marine Corps. We find the proof sufficient to support application of consecutive sentences. This issue is without merit.

VIII. Motion for Recusal

The Appellant argues that the trial court abused its discretion in denying his motion seeking recusal of the trial judge. Specifically, he argues that “[a]s the trial judge in the first trial, he could not properly function as an impartial thirteenth juror that would be hearing the evidence for the first time.”

The decision of whether to grant a recusal rests within the discretion of the trial judge and will not be overturned on appeal unless clear abuse of discretion appears on the face of the record. *State v. Hines*, 919 S.W.2d 573, 578 (Tenn. 1995). A motion to recuse should be granted if the judge has any doubts as to his or her ability to preside impartially in the case, or whenever he or she believes that his or her impartiality can reasonably be questioned. Tenn. Sup. Ct. R. 10, Canon 3(E); *Lackey v. State*, 578 S.W.2d 101, 104 (Tenn. Crim. App. 1978). Moreover, recusal is warranted “when a person of ordinary prudence in the judge’s position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge’s impartiality.” *Alley v. State*, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994). In other words, the determining standard is an objective one, not a subjective one. *Id.* at 820. Courts must avoid the appearance of partiality as well as partiality itself. *Id.* at 823. Furthermore, any comments made by the trial court must be construed in the context of all the facts and circumstances to determine whether a reasonable person would construe those remarks as indicating partiality on the merits of the case. *Id.* at 822. However, we note that a judge is in no way disqualified merely because he has participated in other legal proceedings against the same person. *Hines*, 919 S.W.2d at 578 (citing *King v. State*, 391 S.W.2d 637, 642 (1965)). Moreover, prior knowledge of facts about the case is not sufficient in and of itself to require disqualification. *Alley*, 882 S.W.2d at 822.

The record indicates that the Appellant filed a Motion to Recuse on September 2, 2003, which alleges:

On or about 5-16-03 the Court denied Counsel’s motion to reinstate Defendant’s pre-trial bail of \$50,000, and in fact double bail to \$100,000.

In announcing its decision, and in response to Counsel's argument that Defendant stood before the Court in what should be the same legal situation as he was in prior to trial (i.e. not convicted of any offense) and thus entitled to the same bail arrangements, the Court stated on the record and in open court that while that might be technically true, the court nevertheless had heard this case and knew certain things about the case, and specifically referred to the Court's outrage at the Defendant's statement at sentencing, and generally indicated that the Court was no longer at all impartial as to the guilt or innocence of the Defendant, and acted accordingly in doubling the bail amount.

However, as the State correctly points out, no transcript of the bail hearing or any type of documentation relevant to the issue has been placed in the record. Clearly, allegations contained in a motion may not be considered as evidence. As such, we are unable to find error here because we are unable to review the "comments made by the trial court . . . in the context of all the facts and circumstances to determine whether a reasonable person would construe those remarks as indicating partiality on the merits of the case." *Alley*, 882 S.W.2d at 822.

On the record before us, the only discussion of recusal occurs following jury selection at which time the Appellant renewed his motion, asserting that the trial court had exhibited some prejudice during voir dire by failing to excuse certain jurors for cause. *See supra*. Following an explanation of its refusal to excuse the jurors for cause, the court made the following comments:

And I want [the Appellant] to know at this point the prior trial, as far as I'm concerned, legally and intellectually, is gone. We're starting over from scratch. We'll see how this case transpires, and I'm certain in my mind that I can try this case without any problem. And I don't expect you to -- you don't have to agree with that, but you know, I know that I can do that. So, your motion to recuse is denied, and we will proceed with this trial.

The Appellant further asserts that the trial court was unable to correctly function as the thirteenth juror in the case because the judge had heard the testimony in the Appellant's prior trial. The Appellant's argument here appears somewhat circular. On the one hand, he complains that the trial court could not function impartially because the judge had heard the evidence from the prior trial. On the other hand, the Appellant argues that if the trial court had considered the inconsistencies in the testimony between the two trials, the court "would have found that the jury verdict could not stand factually beyond a reasonable doubt. The inconsistencies in the testimony of [the victim] from the first trial to the second trial should have been enough to support a directed verdict of acquittal." This argument is misplaced. The inconsistencies in the testimony from the first trial were thoroughly developed by trial counsel on cross-examination, and the victim provided explanations for some of those varying statements. It became an issue of credibility for the trier of fact to decide. Obviously, in this case, the jury chose to accredit the testimony of the victim. We find nothing to suggest that the trial court did not adequately function in its role as thirteenth juror and nothing to indicate bias on the part of the trial court. Thus, this issue is without merit.

IX. Sufficiency of the Evidence

The Appellant asserts that the evidence presented at trial was insufficient as a matter of law to support any of his twelve convictions. He argues that “since the alleged victim’s testimony was inconsistent from the first and second trial and the jury’s findings of guilt on twelve (12) out of sixteen (16) counts [, the convictions were] not supported the evidence and had no rational basis in fact.”

In considering this issue, we apply the rule that where the sufficiency of the evidence is challenged, the relevant question for the reviewing court is “whether, after viewing the evidence in the light most favorable to the [State], *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *see also* Tenn. R. App. P. 13(e). Moreover, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *State v. Pappas*, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). This court will not reweigh or reevaluate the evidence presented. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978).

“A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.” *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

Although a conviction may be based entirely upon circumstantial evidence, *Duchac v. State*, 505 S.W.2d 237, 241 (Tenn. 1974), in such cases, the facts must be “so clearly interwoven and connected that the finger of guilt is pointed unerringly at the Defendant and the Defendant alone.” *State v. Black*, 815 S.W.2d 166, 175 (Tenn. 1991) (citing *State v. Duncan*, 698 S.W.2d 63 (Tenn. 1985)). However, as in the case of direct evidence, the weight to be given circumstantial evidence and “[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury.” *Marable v. State*, 313 S.W.2d 451, 457 (Tenn. 1958) (citations omitted).

The Appellant was convicted of eight counts of rape of a child, which is defined as “the unlawful sexual penetration of a victim by the defendant or the defendant by the victim, if such victim is less than thirteen (13) years of age.” T.C.A. § 39-13-522(a) (2003). Sexual penetration is defined as “sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of the victim’s, the defendant’s, or any other person’s body, but emission of semen is not required.”

T.C.A. § 30-13-501(7) (2003). The Appellant was also convicted of four counts of aggravated sexual battery, defined as “unlawful sexual contact with a victim by the defendant or the defendant by a victim . . . [and] the victim is less than thirteen (13) years of age.” T.C.A. § 39-13-504(a)(4) (2003). “Sexual contact” includes “the intentional touching of the victim’s, the defendant’s, or any other person’s intimate parts . . . if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification.” T.C.A. § 30-13-501(6). “Intimate parts” includes “the primary genital area, groin, inner thigh, buttock or breast of a human being.” *Id.* at (2).

Essentially, the Appellant’s argument is a challenge to the weight and credibility of the victim’s testimony based upon the inconsistencies presented in her testimony from the first and second trials. He asserts, despite the victim’s claim that therapy had helped her remember more instances and details, that there is no way that the victim could possibly remember more details in the second trial than she did in the first. We acknowledge that some inconsistencies are present in the victim’s testimony from the two trials, such as which incident was the first to occur. However, all questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *Pappas*, 754 S.W.2d at 623. The jury viewed the witnesses, heard their testimony, and observed their demeanor on the stand. While we acknowledge conflicts in the witness’ testimony on some points, it was the jury’s prerogative to weigh the credibility of the witness and to resolve any conflicts in the testimony. This court will not reweigh or reevaluate the evidence presented. *Cabbage*, 571 S.W.2d at 835. Nor may we give credence to the Appellant’s assertions that it was illogical for the jury to convict on only twelve of the sixteen counts when the evidence was equally as strong on all counts. Again, the jury heard the evidence and evaluated the testimony presented with regard to each count. After weighing that evidence, as is their prerogative, they obviously concluded that certain counts were not established. We will not disturb that decision.

After review, we conclude that the evidence is more than sufficient to support each of the convictions. The victim testified, in specific detail, to each of the circumstances surrounding the twelve convictions. She stated that the Appellant inappropriately touched her intimate parts or inserted his fingers into her vagina when she was less than thirteen years old. Clearly, from these facts, the jury could rationally infer that this was done for purposes of sexual arousal or gratification. Testimony was also introduced by the victim’s mother, her grandmother, and a nurse practitioner, who each corroborated certain details of the victim’s assertions. The jury, by their verdict, rejected the testimony of the Appellant, his wife, and his son with regard to their assertions that the incidents had not occurred. We conclude that the evidence is legally sufficient to support each of the Appellant’s convictions for rape of a child and aggravated sexual battery.

X. Cumulative Effect of Errors

Finally, the Appellant alleges that the cumulative effect of the errors in the trial court effectively denied him a fair trial. Having found no reversible errors, we conclude that this issue is without merit.

CONCLUSION

Based upon the foregoing, the Appellant's eight convictions of rape of a child, his four convictions of aggravated sexual battery, and his effective thirty-two year Department of Correction sentence are affirmed.

DAVID G. HAYES, JUDGE